



## Pro Bono Alert February 2009

# Social Security Appeals Tribunal extends assets hardship provisions to income tested pensioners

The decision in *Martin v Centrelink* (SSAT Appeal) has important implications for income tested pensioners seeking to have an unrealisable financial investment disregarded for the purposes of the income deeming provisions under the *Social Security Act 1991* (Cth).

On 17 December 2008, the Social Security Appeals Tribunal (**Tribunal**) allowed an appeal by Ms Martin to have her financial investment in the City Pacific First Mortgage Fund (**Fund**) disregarded for the purposes of assessing the amount of her income tested aged pension.

Amidst recession fears in the United States of America and difficult local market conditions, City Pacific Limited, the responsible entity for the Fund, triggered a provision under the Fund's constitution to suspend or "freeze" redemption payments to its investors.

As a result all investors in the Fund, including Ms Martin, were unable to access their financial investment.

Under the deeming rules contained in section 1076 of the *Social Security Act 1991*(Cth) (**Act**), most financial investments are deemed to receive a certain level of return, regardless of the actual return received (**Deeming Provisions**).

Centrelink had previously rejected Ms Martin's argument that her financial asset in the Fund should

be disregarded under the hardship provisions of the Act as she was not receiving any income from the Fund and had little hope of doing so in the near future.

The hardship provisions allow for a person to have their financial investment set aside if it can be proven that the financial investment is an unrealisable asset.

Accordingly, Ms Martin received a drastically reduced pension even though she had no other income or assets and was experiencing extreme financial hardship.

The basis of Centrelink's decision was:

- > they did not agree that Ms Martin's investment in the Fund was an unrealisable asset for the purposes of the hardship provisions contained under the Act; and
- > even if Ms Martin's financial investment was an unrealisable asset, Centrelink erroneously believed they could only apply the hardship provisions to asset tested pensions.



This decision has important implications for income tested pensioners who have investments in frozen or non-liquid managed funds.

While exact numbers are unknown, the numbers affected will be substantial as income tested pensions account for approximately 95% of Australia's pensioners; and the global economic downturn has resulted in approximately 13 of the top 20 Australian managed funds being declared either frozen or non-liquid since October 2008.

## Social Security Appeals Tribunal decision

### Background

Ms Martin had invested the proceeds from the sale of her home, being her only asset, into the Fund.

On 3 March 2008, the board of City Pacific resolved to suspend redemption requests from the Fund for 180 days as a result of the sharp increase in the level of redemption requests it had received from its investors.

On 28 July 2008, City Pacific extended the redemption request suspension period for a further 180 days and the Fund was subsequently declared to be non-liquid on 13 October 2008.

Under section 601KA(4) of the *Corporations Act 2001* (Cth), a registered scheme is liquid if its liquid assets account for at least 80% of the value of the scheme property. As a result all existing redemption requests were extinguished.

Unlike a suspended or "frozen" fund, there are no time constraints placed on non-liquid funds to resume redemption requests.

Ms Martin made a number of attempts by approaching Centrelink to have her pension re-assessed on the basis that she was receiving no income from her investment in the Fund which, she contended, was an unrealisable asset.

An unrealisable asset is an asset that cannot be sold or borrowed against, or which a pensioner cannot be reasonably expected to sell or borrow against.

Centrelink denied Ms Martin's request on the basis that:

- > the Fund's current non-liquid status is a temporary measure and therefore Ms Martin could reasonably be expected to realise her asset; and
- > the hardship provisions do not apply to persons assessed under the income test.

### Was Ms Martin's investment in the Fund an unrealisable asset for the purposes of the Act?

On 17 October 2008, Centrelink received an internal memorandum stating that it had been advised that City Pacific had temporarily resolved to freeze redemptions and that the Deeming Provisions will continue to apply to investments in the Fund.

This information was incorrect and, as mentioned earlier, it was impossible to infer when the Fund would resume redemption payments.

However, Centrelink argued that there was no "significant difference" between the Fund's temporary suspension of redemptions and the Fund's subsequent "non-liquid" status.

This interpretation was rejected by the Tribunal in favour of the appellant's evidence that Centrelink failed to inform itself of the critical differences between the two terms:

1. On the one hand, a responsible entity can only suspend redemption payments for a specified period of time as defined under a fund's constitution.
2. In comparison, a non-liquid fund extinguishes all redemption requests indefinitely until such time as the fund is in a position to resume redemption payments.

### Do the Hardship Provisions apply?

Section 1129 of the Act provides that a person who is assessed **under the assets test** may have their asset disregarded in the event that it becomes "unrealisable" (**Hardship Provisions**).

With regard to the second point, the Tribunal grappled with how it could reconcile the appellant's application for relief under the Hardship Provisions since it clearly prohibited **income tested pensioners**.

However, Centrelink failed to read the Hardship Provisions in light of section 1084(2) of the Act. Specifically, section 1084(2) of the Act provides that 'If a financial investment is an unrealisable asset for the purposes of section 1129... the financial asset is not to be regarded as a financial asset for the purposes of section 1076 (**Deeming Exemption**)'.

The Tribunal found that the phrase 'unrealisable asset for the purpose of section 1129' was ambiguous and



difficult to define, due to there being no relevant precedent.

The question was whether the phrase 'for the purpose of section 1129' meant either that:

- > the appellant could not access the Hardship Provisions because section 1129 of the Act can only be applied to pensioners assessed under the assets tests; or
- > the appellant could access the Hardship Provisions via the Deeming Exemption.

In reaching its decision, the Tribunal confirmed that the second meaning 'reflects the basic benevolence inherent in Parliament's intent through the inclusion of section 1084 in the Act [and the second definition] is the applicable interpretation to rely on'.

In light of its reasoning, the Tribunal accepted that Ms Martin's financial investment in the Fund was an unrealisable asset and should be granted a Deeming Exemption for the purposes of the Hardship Provisions.

It should be noted, however, that the Tribunal members considered a number of issues in deciding in favour of the appellant, including:

- > the number of attempts made by the appellant to access her investment held by the Fund; and
- > the current economic climate, which the Tribunal was satisfied, would prevent the appellant from selling or using her investment as security for borrowing.

#### Recent Developments

Shortly after the decision in *Martin v Centrelink* (SSAT Appeal), the Minister for Families, Housing, Community Services and Indigenous Affairs announced that the Australian Government will specifically exempt units in the City Pacific First Mortgage Fund from the income deeming provisions to assist pensioners who are income tested and who hold investments in the Fund.

The Government's exemption for pensioners will retrospectively take effect from 4 July 2008.

#### Implications

Given the current spate of frozen and non-liquid funds around Australia, this decision provides some guidance with regard to the Tribunal's preferred interpretation of section 1084(2) of the Act when read in light of the Hardship Provisions.

#### **The Tribunal's decision confirms the proposition that financial relief is available to income tested pensioners who can satisfy the Deeming Exemption under the Act.**

While the Government has finally come to the aid of pensioners holding units in the City Pacific First Mortgage Fund, pensioners in similar circumstances who are experiencing difficulty in obtaining financial relief from Centrelink may now be able to seek a reassessment of their pension under the Deeming Exemption.

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